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 12 and THE HOME DEPOT, INC. and Third-Party Plaintiff BERNZOMATIC

13

14 **UNITED STATES DISTRICT COURT**

15 **SOUTHERN DISTRICT OF CALIFORNIA – SAN DIEGO**

16 ANDREW SHALABY, an individual, and SONIA  
 DUNN-RUIZ an individual,

17 Plaintiffs,  
 18 vs.

19 IRWIN INDUSTRIAL TOOL COMPANY, THE  
 20 HOME DEPOT, INC., and DOES 2 through 100,  
 inclusive,

21 Defendants.

22

23 BERNZOMATIC,

24 Third Party Plaintiff,  
 25 vs.

26 WESTERN INDUSTRIES, INC.,  
 27 WORTHINGTON INDUSTRIES, AND ROES 2  
 through 100, inclusive,

28 Third Party Defendants.

**Case No.: 07-CV-2107 W BLM**

**DECLARATION OF SHELLEY  
 HURWITZ IN SUPPORT OF  
 MOTION FOR LEAVE TO  
 DESIGNATE EXPERT WITNESS  
 JASON LUSK**

Judge: Hon. Thomas J. Whelan  
 Magistrate Judge: Hon. Barbara Major

**Date: October 2, 2008, 9:00 am  
 Courtroom: A  
 NO ORAL ARGUMENT  
 REQUIRED**

Mand. Settlement Conf: October 14, 2008  
 Pretrial Conference: January 12, 2009

**DECLARATION OF SHELLEY G. HURWITZ**

I, Shelley G. Hurwitz, declare as follows:

1. I am an attorney at law admitted to practice before this Court. I am an associate at  
2 the firm of Holland & Knight LLP, counsel for Bernzomatic in this action. I have personal  
3 knowledge of the matters set forth herein, and if called as a witness, I could and would so testify.

2. Attached hereto as Exhibit 1 is a true and correct copy of photographs of an  
3 exemplar Bernzomatic hand held torch, model number TS4000, and MAPP gas cylinder.

3. Attached hereto as Exhibits 2 and 3 are true and correct copies of pertinent  
4 excerpts from the depositions of Warren Ratcliff and Joe Russo.

4. This matter was originally assigned to Magistrate Judge Hon. Louisa Porter.  
5 Judge Porter subsequently recused herself. On July 14, 2008, this case was transferred to  
6 Magistrate Judge Hon. Barbara L. Major. Prior to the recusal, Judge Porter issued a Scheduling  
7 Order Regulating Discovery and Other Pretrial Proceedings (the "Scheduling Order"), attached  
8 hereto as Exhibit 4.

5. The parties thereafter exchanged initial expert designations, and subsequently  
6 exchanged expert reports.

6. Attached hereto as Exhibit 5 is a true and correct copy of Plaintiffs' Disclosure of  
7 Experts.

7. Attached hereto as Exhibit 6 is a true and correct copy of Dr. Robert Anderson's  
8 report in this matter. Attached hereto as Exhibit 7 is a true and correct copy of Dr. Anderson's  
9 supplemental report in this matter.

8. Attached hereto as Exhibit 8 is a true and correct copy of Jason Lusk's expert  
9 report provided to plaintiffs on August 1, 2008, the date that all non-damages supplemental  
10 expert reports were exchanged by the parties.

9. Attached hereto as Exhibit 9 are true and correct copies of emails between myself  
10 and plaintiffs' counsel, Mark Epstein. Also included in Exhibit 9 is a true and correct copy of an  
11 objection filed by plaintiffs to the designation of Jason Lusk.

1           10. The court issued an order on August 26, 2008, continuing the expert discovery  
2 deadline to September 30, 2008.

3        11. The Bernzomatic Defendants will agree to cover the expert witness fees for Mr.  
4 Lusk's expert witness deposition.

5           12. Attached as Exhibit 10 is a true and correct copy of pertinent excerpts from the  
6 deposition of Dr. Robert Anderson.

7       13. On August 27, 2007, the Bernzomatic Defendants filed an ex parte application  
8 seeking leave to designate expert witness Jason Lusk. On September 4, 2008, the Court held a  
9 telephonic conference in response to the filing of the ex parte application. I attended the  
10 telephonic conference, during which the Court indicated that it believed that defendants were on  
11 notice of the need for Mr. Lusk's testimony on July 3, 2008 (the date Dr. Anderson's initial  
12 report was disclosed) and requested case law supporting the notion that Bernzomatic was diligent  
13 in seeking relief.

14 I declare under penalty of perjury under the laws of the United States that the foregoing is  
15 true and correct. Executed this 12 day of September 2008 in Los Angeles, California.

/s Shelley Hurwitz  
Shelley G. Hurwitz

**Andrew Shalaby v Newell Rubbermaid, Inc., et al.**  
**United States District Court, Southern District of CA (San Diego)**  
**Case No. 3:07-cv-02107-W-POR**

## **PROOF OF SERVICE**

STATE OF CALIFORNIA )  
 ) ss.  
COUNTY OF LOS ANGELES )

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 633 West Fifth Street, 21<sup>st</sup> Floor, Los Angeles, California 90071.

**On September 12, 2008, I served the document described as:**

**DECLARATION OF SHELLEY HURWITZ IN SUPPORT OF MOTION FOR LEAVE  
TO DESIGNATE EXPERT WITNESS JASON LUSK**

on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

X VIA THE ECF FILING SYSTEM .

I declare under penalty of perjury under the laws of the United States that the above is true and correct and that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on September 12, 2008, at Los Angeles, California.

/s Shelley Hurwitz  
Shelley G. Hurwitz

**Andrew Shalaby v Newell Rubbermaid, Inc., et al.**  
**United States District Court, Southern District of CA (San Diego)**  
**Case No. 3:07-cv-02107-W-POR**

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